PP

v.

MOHAMAD MUSA AMARULLAH

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CRIMINAL TRIAL NO: 45-39-98]
3 JANUARY 2002

CRIMINAL PROCEDURE: *Accused - Police report - Application for - Whether accused entitled to copy of police report - Criminal Procedure Code, ss. 107, 108A*

EVIDENCE: *Statement - Cautioned statement admitted in evidence - Statement to be admitted under s. 27 of the Evidence Act - Whether voire dire necessary - Evidence Act 1950, ss. 24, 25, 26, 27*

The accused was charged for drug-trafficking, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') and punishable with death under s. 39B(2) of the same Act. In the course of the case, a prosecution witness, one Inspector Noor Shahriman who led the raiding party that arrested the accused and recovered the drugs, said in evidence that he had recorded a cautioned statement from the accused. The prosecution intended to admit the cautioned statement not under s. 37A(1)(b) of the DDA 1952 but under s. 27 of the Evidence Act 1950. Defence counsel on the other hand objected to the admission of the statement and requested a trial within a trial to determine the voluntariness of the cautioned statement.

The issues for consideration were: (i) whether a trial within a trial is required for the purpose of admitting a statement under s. 27 of the Evidence Act 1950; and (ii) whether the accused is entitled to a copy of the first information report.

Held:

[1] The prosecution is at liberty to proceed to adduce evidence relating to information received from the accused that leads to the discovery of the article in question and there is no need to hold a special trial within a trial. The voluntariness or otherwise of such a statement as to lead to the discovery must be treated as any other piece of evidence of the prosecution, to be tested in the normal course of cross-examination. A *voire dire* is therefore not necessary. (p 369 e-f)

[2] The first information report is the first recorded information to the police with regard to a particular offence and this report forms the basis, to commence a full-throttled investigation which includes interviewing witnesses, recording statements, visiting the scene of the offence, taking cautioned statements, producing the accused before a magistrate to seek his remand and so on. The accused therefore must as of right be given a copy of this first information report which seeks to inculpate him so that he can be in a position to defend himself by being acquainted with the facts leading to the initial complaint made against him. This is all the more necessary if it transpires in the course of his trial that the evidence led so far seems to be in variance with what is contained in the first information report. (p 372 e-f)

[Case to proceed; copy of first information report to be given to accused.]

Case(s) referred to:
Anthony Gomez v. Ketua Polis Daerah, Kuantan [1977] 2 MLJ 24 ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 ***(not foll)***
PP v. Ismail Atan [1992] 2 CLJ 1253; [1992] 3 CLJ (Rep) 228 ***(not foll)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 ***(foll)***
PP v. Lee Eng Kooi (unreported) ***(refd)***
PP v. Roslim Harun [1993] 3 CLJ 505 ***(not foll)***
Roslim Harun v. PP [1994] 2 CLJ 486 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 107, 108A, 113(1)
Dangerous Drugs Act 1952, ss. 2, 37A(1)(b), 39B(1)(a), (2)
Evidence Act 1950, ss. 24, 25, 26, 27

For the accused - En Athimulan; M/s Athimulan & Co
For the prosecution - Yusob Md Tasir DPP

Reported by Mariette Peters-Goh

JUDGMENT

RK Nathan J:
The accused is charged for trafficking in drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable with death under s. 39B(2) of the same Act (the Act). For the purposes of deciding this issue there is no need for me to relate the facts. In the course of the case a prosecution witness PW5 Chief Inspector Noor Shahiriman bin Ngah, who led the raiding party that arrested the accused and recovered the drugs said in evidence that he recorded a cautioned statement from the accused at or near the scene of arrest after administering the caution pursuant to s. 37A(1)(b) of the said Act. When defence counsel objected to the admission of the cautioned statement and asked for a trial within a trial to determine the voluntariness of the cautioned

statement the learned deputy public prosecutor informed the court that he was not seeking to admit the cautioned statement under s. 37A(1)(b) of the Act but under s. 27 of the Evidence Act 1950.

At this stage parties asked for an adjournment to the afternoon to look further into the law to submit. In the afternoon Mr Athimulan submitted that even if the learned deputy intended to admit the statement under s. 27 of the Evidence Act I ought to hold a trial within a trial to determine the voluntariness of the said statement and he relied on the decision of the Federal Court in *Md Desa bin Hashim v. Public Prosecutor* [1995] 4 CLJ 677. In *Md Desa*, Gopal Sri Ram JCA sitting in the Federal Court held, following a line of Indian authorities that the rule permitting admissability contained in s. 27 is an exception to the prohibition appearing in the two sections that immediately precedes it but does not qualify the all pervading qualification enacted in s. 24. Simply put the decision meant that ss. 25 and 26 are subject to s. 27 but that all these three sections are governed by and are subject to s. 24. It is therefore important to reproduce these relevant sections.

> 24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.
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> 25. (1) Subject to any express provision contained in any written law, no confession made to a police officer who is below the rank of Inspector by a person accused of any offence shall be proved as against that person.
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> (2) (Repealed)
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> 26. (1) Subject to any express provision contained in any written law, no confession made by any person whilst he is in the custody of a police officer, unless it is made in the immediate presence of a President of a Sessions Court or magistrate, shall be proved as against that person.
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> (2) (Repealed)
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> 27. (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.
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> (2) (Repealed)

Gopal Sri Ram JCA went on to hold at p. 687 as follows:

> Having regard to the language of each of the sections which we have set out and the sequence in which they have been legislatively framed, it is abundantly clear, in our judgment, that in order for a confession or other statement or information to qualify for admission under s. 27, it must have been made voluntarily. A discovery made in consequence of a confession extracted by illegitimate means in the sense described in s. 24 is inadmissible. When a challenge is taken as to the voluntariness of the information, it is imperative for a trial judge to determine that issue upon the *voire dire.*

However, this same case was subjected to a review by a 5-panel Bench comprising of none other than the former Chief Justice and the present Chief Justice in *Goi Ching Ang v. Public Prosecutor* [1999] 1 CLJ 829 FC. This court held that since prior to *Md Desa*'s case the Malaysian Courts had persistently held that s. 27 was not subject to s. 24 of the Act, any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature to review. The court went on to hold that once information was proved to be within the province of s. 27, the trial court could admit it in evidence notwithstanding that the information might not have been given voluntarily. Therefore it is my judgment that in line with the decision in *Goi Ching Ang*, the prosecution is at liberty to proceed to adduce evidence relating to such information received from the accused that led to the discovey of the article in question and that there is no need to hold a special trial within a trial and to require the prosecution to carry a heavier burden to prove, in a trial within a trial, the voluntariness of the statement. The voluntariness or otherwise of such a statement as to lead to the discovery must be treated as any other piece of evidence of the prosecution, to be tested in the normal course of cross-examination. A *voir dire* is not necessary. In fact the 5-member panel in *Goi Ching Ang (supra)* did not categorically state that where the prosecution chooses to rely on s. 27, a *voir dire* is necessary. To my mind the Federal Court had clearly intended that s. 27 ought not to be subject to s. 24 and to such similar sections when it said at p. 850 as follows:

> Furthermore, if s. 27 were held subject to s. 24, then, logically, it would also be held to be subject to other provisions to the like effect or of similar nature as the said s. 24 contained in other enactments, eg s. 113 of the Criminal Procedure Code, s. 37A of the Dangerous Drugs Act 1952, s. 75 of the Internal Security Act 1960, s. 15 of the Prevention of Corruption Act 1961 (repealed with effect from 8 January 1998), s. 45 of the Anti-Corruption Act 1997.

It would seem therefore that s. 27 is an independent section and that any reliance upon that section to introduce any relevant evidence must be treated without linkages to the preceding sections and in particular to s. 24 of the Evidence Act 1950. I therefore overruled Mr Athimulan's request for a trial within a trial and directed the case to proceed.

As the case proceeded another important issue arose upon which this court was called upon by both parties to make a ruling. This relates to the first information report, that is, Jelutong Report 84/98 which the raiding officer had made after the arrest of the accused. The learned deputy informed the court that he did not intend to produce the said first information report to the court. Mr. Athimulan contended that whilst it was the prerogative of the prosection whether to tender or not to the court the first information report, it was his client's right to be given a copy of the first information report. The learned deputy relied heavily upon the decision in *Public Prosecutor v. Roslim bin Harun* [1993] 3 CLJ 505. In that case, where the facts leading to the lodgement of the first information report was almost similar, Abdul Malik bin Haji Ishak JC (as he then was) had held that "once the police have taken active steps in investigation, any written statements written by them are not first information reports and consequently inadmissable in evidence". He went on to hold "that any statement recorded after the commencement of the investigation and after there has been some development is not only not first information but has very little or no value at all as the original story because it can be made to fit into the case as the case developed." It would seem that the rational in rejecting such a report as a first information report is two-fold that is (1) it serves no purpose as investigations have already commenced and (2) it might give an opportunity for the officer concerned to add on or embelish what he had done. *Roslim*'s case went up to the then Supreme Court. (See *Roslim bin Harun v. Public Prosecutor* [1994] 2 CLJ 486). Unfortunately, this issue of the first information report was not argued before the court. The court was merely called upon to decide whether it was sufficently proved to the satisfaction of the court that the subject matter of the charge was cannabis within the meaning of s. 2 of the Dangerous Drugs Act 1952. Whilst the Supreme Court had upheld the judgment of the High Court I cannot say with certainty, in the absence of this important issue of the first information report being made available to the defence being decisively dealt with, that the Supreme Court had agreed with the learned trial judge's views. In fact Mr. Athimulan, who was also co-counsel in that appeal, assured me that this issue was not canvassed before the then Supreme Court.

In *Public Prosecutor v. Lee Eng Kooi* [1993] 2 CLJ 534, Vincent Ng JC (as he then was) was also called upon to decide on a similar issue. The raiding officer had lodged a police report (exh. P27). However his report was not tendered during his examination-in-chief but was marked as an exhibit only when he was recalled. Defence counsel then applied to the court for an order that a copy of that first information report, that is P27, be supplied to him by the prosecution to enable him to use it as a basis to cross-examine the other witnesses. In a well written judgment with which I totally agree, Vincent Ng JC said at p. 537 as follows:

The complete removal of the original provision in s. 113(1) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') by virtue of Act A324 which states: 'No statement made by any person ... in the course of a police investigation ... shall be used as evidence' and its replacement with a new provision which states: 'Where any person is charged ... any statement ... by that person ... shall be admissible in evidence ... and ... may be used in cross-examination for the purpose of impeaching his credit' – the latter provision concerns and pertains only to any person who is charged as opposed to the earlier generalised provision – has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

> There is thus no justification for the refusal by the learned DPP to supply a copy of PW3's report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s. 35 of the Evidence Act 1950 ('the Act'). See *PP v. Lee Hoay Chun* (Penang High Court Trial No. 47(58)-13-88) (unreported) and *Wai Chan Leong v. PP* [1989] 3 MLJ 356.

The accused was acquitted and the appeal to the Federal Court was dismissed and the judgment of the High Court was upheld. (See *PP v. Lee Eng Kooi* Mahkamah Agung Rayuan Jenayah No: 05-63-93 heard on 17 May 1995, unreported.) The notes of evidence of the court proceedings show that the court was referred to the trial judge's views on the removal of the original provision under s. 113(1) of the Criminal Procedure Code and the fact that the report P27 was made under s. 107 of the Criminal Procedure Code and admitted under s. 108A of the Criminal Procedure Code. For ease of reference the said sections read as follows:

> 107. (1) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.
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> (2) Every such information shall be entered in a book to be kept by that officer, who shall append to such entry the date and hour on which that information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it.
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> 108A. In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of section 107 or 108, and purporting to be certified to be a true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded.

The learned deputy public prosecutor took the view that Jelutong Report 84/98 is not the first information report. He relied on *PP v. Ismail bin Atan* [1992] 2 CLJ 1253; [1992] 3 CLJ (Rep) 228 wherein James Foong JC (as he then was) held that statements made and recorded after investigation be it in

the form of a police report or otherwise is not a first information report but more of an investigation statement. The decision in *Ismail bin Atan* is more in line with the decision in *Roslim bin Harun.* As neither in *Ismail bin Atan* nor in *Roslim bin Harun* the court was addressed on the issue of the removal of the original provision in s. 113(1) of the CPC and the inclusion of the new provision and its impact on what constitutes first information and non-first information police reports, I decline to follow the decisions in *Roslim bin Harun* and *Ismail bin Atan* and adopt the views expressed in *Lee Eng Kooi*.

In any case in so far as this case is concerned it is my judgment that Jelutong Report 84/98 is the first information report. In *Ismail bin Atan* there was clear evidence as found by the learned judge that PW3 the head of the raiding party had conducted the raid, "pursuant to information which PW3 personally received earlier". That is why the learned judge went on to hold that that information which PW3 had received earlier ought to have been reduced into a written report to be admitted under s. 108A of the Criminal Procedure Code. In the case before me the raiding officer gave no such evidence of having received any prior information.

In any case the first information report is the first recorded information to the police with regard to a particular offence and this report forms the basis, to commence a full-throttled investigation which includes interviewing witnesses, recording statements, visiting the scene of the offence, taking cautioned statements, producing the accused before a magistrate to seek his remand and so on. The accused therefore must as of right be given a copy of this first information report which seeks to inculpate him so that he can be in a position to defend himself by being acquainted with the facts leading to the initial complaint made against him. This is all the more necessary if it transpires in the course of his trial that the evidence led so far seems to be in variance with what is contained in the first information report. Coming back to the case before me I have found as a fact that Jelutong Report 84/98 is indeed the first information report. That being so, it is also a public document. (See *Anthony Gomez v. Ketua Polis Daerah, Kuantan* [1977] 2 MLJ 24 FC). Notwithstanding the fact that the learned deputy in the case before me does not intend to tender the first information report it is my judgment that he must in any case hand over a certified true copy of the said report to the accused to enable him to conduct his defence.